

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LITTERAL,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 261330

Macomb Circuit Court

LC No. 2003-003508-FC

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

A jury convicted defendant Terry Litteral of four counts of first-degree criminal sexual conduct.¹ The trial court sentenced Litteral to concurrent prison terms of 40 to 80 years for each conviction. Litteral appeals as of right. We affirm.

I. Basic Facts And Procedural History

The jury convicted Litteral of sexually assaulting his former fiancé's daughter, who was age 18 at the time of trial. The victim was four years old when Litteral moved in with the victim and her mother. The victim's mother and defendant later had three children together. According to the victim, Litteral sexually assaulted her intermittently from age 4 until age 12, when she and her three younger siblings were removed from the home in 1998 because of neglect. The four charged incidents occurred in 1997 and 1998, when the victim was 10 and 11 years old, and involved one act of sexual intercourse, two acts of digital penetration, and one act of oral sex. During most of the incidents, the victim's mother was at work or "passed out" from the use of alcohol. In May 1999, while in foster care, the victim first disclosed the sexual assaults. In July 1999, the victim's medical examination revealed that "there was no hymenal tissue left at all," indicating that "there's been repeated intercourse." The examination also revealed that the victim had a sexually transmitted disease (STD).

The victim testified that, although Litteral assaulted her on numerous occasions, she could recall specific details of only a few incidents. On one occasion, according to the victim, her mother was at work and, because she was grounded, she asked Litteral for permission to go out. The victim said that Litteral responded that he would allow her to leave in exchange for a "blowjob," and the victim agreed. The victim stated that during the half-hour to hour duration of

¹ MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age).

this encounter, Litteral digitally penetrated her and that she performed oral sex on him. The victim testified that on another occasion, she was grounded and wanted to go to her aunt's house, Litteral "bribed [her]," and had sexual intercourse with her until he ejaculated. The victim indicated that Litteral first had sexual intercourse with her on her 11th birthday. The victim explained that whenever she was "grounded or anything like that . . . or wanted money [she would] just do whatever [Litteral] said." The victim first questioned Litteral's actions after she attended a school sex education class. According to the victim, when she questioned Litteral, he assured her that "it's okay, [he is her] father." The victim explained that she did not reveal the assaults to anyone because Litteral threatened that "if [she] ever told anybody he'd kill [her]" and "hurt [her] mom."

The victim testified that her aunt and uncle, Tammy Turner and Scott Anderson, once walked in while Litteral was assaulting her, but did not call the police. Turner and Anderson testified that, on one occasion, they entered a bedroom and observed Litteral and the victim in the bed under the covers. Turner could see that neither had on a shirt, but could not recall what they were doing. Anderson indicated that both were naked, and that Litteral jumped off the victim when he and Turner entered the room. On a different occasion, Turner and Anderson saw Litteral and the victim in bed next to each other. Anderson indicated that they were naked, but Turner could not recall if they were clothed. Anderson and Turner claimed to be intimidated by Litteral's family, and Turner explained that the victim's maternal grandfather dissuaded her from contacting the police. Turner and Anderson spoke to the victim's mother, who is Anderson's sister, and Turner indicated that she was "in denial," and "didn't want to discuss it." The victim testified that her mother was aware of the assaults, but did nothing.

The victim testified that her younger brother also witnessed some of the sexual assaults when he was four or five years old. The brother, who was 12 at the time of trial, testified that he saw Litteral "drag the victim up the stairs," and "have sex" with her. In total, the brother saw Litteral and the victim "have sex" on two to five occasions. The brother also recalled that, on two or more occasions, when Litteral and the victim were in a locked room, his mother "was pounding" on the door. On one occasion, the brother heard his mother direct Litteral to "get off of" the victim.

Litteral testified on his own behalf and denied any wrongdoing. He maintained that the victim was promiscuous.

II. Effective Assistance Of Counsel

A. Standard Of Review

Litteral argues that defense counsel was ineffective for failing to investigate and argue an insanity defense. Because Litteral failed to raise this issue in the trial court in a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record.²

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

B. Legal Standards

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.”³ To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.⁴

“A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses.”⁵ A criminal defendant is denied the effective assistance of counsel by his attorney’s failure to investigate and present a meritorious insanity defense.⁶ When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial.⁷

The test for criminal insanity is found in MCL 768.21a. “An individual is legally insane if, as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.”⁸ “Mental illness . . . does not otherwise constitute a defense of legal insanity.”⁹ The defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence.¹⁰

C. Applying The Standards

There is no evidence here that Litteral made a good-faith effort to avail himself of the right to present an insanity defense at trial. Even on appeal, Litteral has not provided any affidavits or other documentation indicating that he had any medical or psychological condition at the time of the offenses to support that exploration of insanity might have been reasonable. Litteral has consistently maintained his innocence and has not argued that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. Litteral relies on statements in the presentence investigation report (PSIR) that he “has exhibited the behavior of a pedophile,” and that he regularly drank alcohol and “experiment[ed] with both marijuana and powder cocaine.” But these statements do not provide the basis for a diagnosis of criminal insanity. Rather, the pedophile reference, which was not made by qualified medical personnel,

³ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

⁴ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger*, *supra* at 69.

⁵ *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999).

⁶ *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984).

⁷ *Ayres*, *supra*.

⁸ MCL 768.21a(1).

⁹ *Id.*

¹⁰ MCL 768.21a(3).

merely described Litteral's actions of sexually assaulting a child over a period of several years. Additionally, Litteral provides no documentation that he suffers from pedophilia, and no authority that pedophilia is a mental illness that can form the basis for legal insanity.

With regard to substance abuse, the PSIR states that, although Litteral indicated some use of drugs and alcohol, he "denied" "ever" having a substance abuse problem, and indicated that he "did not like [marijuana or cocaine] and never used them on a regular basis." Regardless, voluntary intoxication cannot form the basis for an insanity defense.¹¹ Because there is no basis for concluding that an insanity defense was a substantial defense, Litteral cannot establish a claim of ineffective assistance of counsel.¹²

III. Pretrial Motions

A. Standard Of Review

Litteral argues that the trial court abused its discretion by denying his motion to dismiss because of a four-year, pre-arrest delay. This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion.¹³ An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.¹⁴

B. Legal Standards

To warrant reversal of a defendant's conviction, the pre-arrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial.¹⁵ To constitute actual and substantial prejudice, the pre-arrest delay must have meaningfully impaired the defendant's ability to defend himself from the charges against him such that the outcome of his trial likely was affected.¹⁶ If a defendant establishes actual and substantial prejudice, the prosecution then bears the burden of establishing that the reason for the delay was sufficient to justify that prejudice.¹⁷ "In evaluating the reason for the delay, the court may consider the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant."¹⁸

¹¹ MCL 768.21a(2).

¹² See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that defense counsel is not required to advocate a meritless position).

¹³ *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001).

¹⁴ *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

¹⁵ *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000).

¹⁶ *Id.*

¹⁷ *Herndon*, *supra* at 390.

¹⁸ *Id.*

C. The Pre-Arrest Delay

At the preliminary examination, the victim testified that her mother had a general knowledge that Litteral was sexually assaulting her, and, on one occasion, walked in when she and Litteral were engaging in a sexual act. She also indicated that, on one occasion, her friend witnessed her and Litteral engaging in a sexual act. The victim explained that she first disclosed the sexual assaults in the spring of 1999, at which time the police were alerted. The victim's mother died in November 1999, as a result of alcoholism. The victim's friend died in July 2000, in an automobile accident. In September 2003, a felony complaint was issued, and Litteral was bound over on the charges on October 30, 2003. Litteral argued that the delay resulted in actual and substantial prejudice because the victim's mother and the friend were unavailable to testify at trial.

We conclude, however, that Litteral has failed to show that the loss of the testimony resulted in any meaningful impairment of his defense. Death of the witnesses alone is insufficient to show that a defendant suffered actual and substantial prejudice from the pre-arrest delay¹⁹ and there is no indication that either witness would have testified in a manner helpful to the defense. As the trial court aptly explained:

[Litteral's] assertion that [the victim's friend], like the victim's mother, *could* have given testimony to exculpate [him] is insufficient to rise to the level of being "undue" and misses the point entirely

* * *

Moreover, it is the victim's own testimony at the preliminary hearing that suggests each witnesses' [sic] materiality in this case. These were not defense witnesses whose statements/observances were lost as a result of a profoundly haphazard investigation conducted by the People. Indeed, the Court believes that the loss of such accounts, if any, would be felt more severely by the People. [Emphasis in original.]

Additionally, Litteral's allegations that because of the passage of time he was unable to remember certain events surrounding the charges and unable to prove that he did not have a STD are not enough to establish actual and substantial prejudice. Vague claims of a loss of physical evidence or witness memory are not enough to establish actual and substantial prejudice.²⁰ The trial court also properly concluded that the delay was explainable by the prosecution's need for additional investigation.²¹ There is nothing in the record to indicate that the pre-arrest delay in this case was intended to gain a tactical advantage for the prosecution.²²

¹⁹ *Adams, supra* at 136.

²⁰ *Crear, supra* at 166; *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988).

²¹ *United States v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *Adams, supra* at 134, 140 (stating that the need for further investigation is a proper reason for delay, and the prosecution is not required to proceed with a case before it has sufficient evidence to convict).

²² See *Adams, supra* at 144.

D. Therapy Records

We also reject Litteral's claim that the trial court erred in denying his request for an in camera review of the victim's therapy records. We review a trial court's ruling on a discovery motion for an abuse of discretion.²³ The trial court also has discretion to conduct an in camera review to determine whether records contain discoverable materials.²⁴ Before an in camera inspection occurs, a defendant must show "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense."²⁵ "The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party."²⁶

Here, Litteral failed to meet his burden of establishing the need for an in camera review of the victim's therapy records. Litteral argued that it was necessary for the trial court to conduct an in camera review because the victim may have made allegations of sexual abuse against other individuals. We agree with the trial court that Litteral made a "generic claim," "not predicated upon any discernable demonstrable fact." Even on appeal, Litteral has not proffered any specifics regarding the alleged incidents, including identifying the accused persons. Because Litteral's request was general and based on speculation about what *may* be in the records, he was not entitled to an in camera review.

E. Juvenile Records

We also reject Litteral's claim that the trial court erred in denying his motion to produce the victim's confidential juvenile records under MCR 3.925(D)(2)²⁷ and MCL 712A.23.²⁸ In denying Litteral's motion, the trial court found that there were no delinquency proceedings initiated or prosecuted against the victim, and the only proceeding that involved the victim was a termination of parental rights proceeding that concerned the victim's mother's parental rights.

²³ *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

²⁴ *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996).

²⁵ *People v Stanaway*, 446 Mich 643, 676-677; 521 NW2d 557 (1994).

²⁶ *Id.* at 680, quoting *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).

²⁷ MCR 3.925(D)(2) provides:

Only persons who are found by the court to have a legitimate interest may be allowed access to the confidential files. In determining whether a person has a legitimate interest, the court shall consider the nature of the proceedings, the welfare and safety of the public, the interest of the minor, and any restriction imposed by state or federal law.

²⁸ MCL 712A.23 provides:

Evidence regarding the disposition of a juvenile under this chapter and evidence obtained in a dispositional proceeding under this chapter shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under this chapter. This section does not apply to a criminal conviction under this chapter.

Under these circumstances, we agree that MCL 712A.23 strictly proscribes any derivative use of the termination of parental rights proceeding, and that Litteral did not demonstrate a legitimate interest in having those records produced at his trial.

IV. Inadmissible Hearsay

A. Standard Of Review

Litteral argues that he was denied a fair trial when the victim's brother testified regarding what his mother told him about the alleged offenses. Because Litteral failed to raise this issue below, we review this claim for plain error affecting substantial rights.²⁹

B. The Brother's Testimony

At trial, the victim's brother indicated that he observed Litteral and the victim having sex. After the brother explained his observations, the following exchange occurred between him and the prosecutor:

Q. When you saw this, what did you think was happening when you were four?

A. That they were sleeping together.

Q. Did you know what sleeping together meant when you were four years old?

A. No.

Q. So when did you find out what they were doing; when did you realize what they were doing?

A. When Tonya [the victim's mother] told me.

Q. When who?

A. Tonya.

Q. Who is that?

A. She was my biological mother.

Q. What did she tell you?

A. She told me that that usually – that usually means that two people are having sex.

²⁹ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction.³⁰ Here, the challenged statements were not offered to prove the truth of the matter asserted, that is, that Litteral sexually assaulted the victim. Rather, the purpose of the questions and answers were to explain how the four-year-old realized that what he observed was sexual activity. Before the exchange, the brother had already described his observations in detail. (For example, the brother testified that Litteral and the victim would be in the bed, “all their clothes would be off” and their bodies “were moving” “really close together.” According to the brother, Litteral “looked happy,” and the victim “looked scared.”) Consequently, we conclude that inclusion of the brother’s testimony was not plain error.

V. Sexually Transmitted Disease

A. Standard Of Review

Litteral argues that he was denied a fair trial when the trial court allowed testimony about the victim having an STD, which Litteral maintains was irrelevant and unduly prejudicial. Because defendant did not object to this evidence, we review this claim for plain error affecting substantial rights.³¹

B. Legal Standards

Generally, all relevant evidence is admissible, and irrelevant evidence is not.³² Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.³³ But even if relevant, evidence may be excluded if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice.³⁴ “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.”³⁵

C. The Testimony

In discussing the results of the victim’s July 1999, medical examination, a nurse practitioner indicated that the victim had venereal warts. She explained that, in a male, when treated, venereal warts can heal with no lasting evidence. A police detective indicated that, during an interview with the victim in 2003, she claimed to have contracted the STD from Litteral. The detective explained, however, that the police did not execute a search warrant to determine if

³⁰ See MRE 801; MRE 802.

³¹ *Carines, supra.*

³² MRE 402.

³³ MRE 401.

³⁴ MRE 403.

³⁵ *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (citations omitted).

Litteral had an STD, because that determination was not necessary to prove the charged offenses. In closing argument, the prosecutor briefly mentioned that the victim “got” an STD. Thereafter, in his closing argument, defense counsel noted that the victim had an STD, and argued that the police did not obtain a search warrant to determine if Litteral had an STD “because he doesn’t have one, and that would blow their case.”

D. Applying The Standards

Because Litteral’s theory was that the victim’s allegations of sexual assault were fabricated, evidence that she had an STD, coupled with testimony that STDs are contracted through sexual intercourse, was relevant because it tended to corroborate her claims of sexual assault. Because the evidence was not linked to Litteral, however, the probative value of the evidence was not considerable. But the danger of unfair prejudice was also not high. It was apparent that there was no evidence that Litteral had an STD and that the police never attempted to test him. Moreover, defense counsel used the fact that Litteral was never tested to support the defense. Also, Litteral was not precluded from presenting evidence that he was not the source of the victim’s STD. For these reasons, we conclude that Litteral has not demonstrated a plain error that affected his substantial rights.

VI. Other Acts Evidence

A. Standard Of Review

Litteral claims that he was denied a fair trial because of “repeated” references to uncharged sexual acts between himself and the victim. Because Litteral failed to object to this evidence below, we review this claim for plain error affecting substantial rights.³⁶

B. Uncharged Sexual Acts

MRE 404(b) prohibits “evidence of other crimes, wrongs, or acts” to prove a defendant’s character or propensity to commit the charged crime.³⁷ But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant’s character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice.³⁸ Additionally, the prosecution must provide notice before trial when it intends to introduce other acts evidence.³⁹

Because it is not apparent that the challenged evidence could not have been received successfully and correctly under MRE 404(b), we conclude that Litteral has failed to demonstrate

³⁶ *Carines, supra.*

³⁷ MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

³⁸ *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

³⁹ MRE 404(b)(2).

plain error. In *People v DerMartzex*,⁴⁰ the Michigan Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. Noting that the credibility of the alleged victim is typically the principal issue in a CSC case, the Court explained that "[l]imiting [the victim's] testimony to the specific act charged and not allowing [the victim] to mention acts leading up to the assault would seriously undermine [the victim's] credibility in the eyes of the jury."⁴¹ The Court noted, however, that evidence of prior sexual acts would not always be admissible and could be excluded if the prejudicial effect outweighed the probative value.⁴²

The evidence here was not offered to show that Litteral had a bad character. Rather, it assisted the jury in weighing the victim's credibility, particularly where Litteral denied any wrongdoing. As in *DerMartzex*, limiting the victim's testimony to the four charged isolated acts would have seriously undermined the victim's credibility in the eyes of the jury. In brief, testimony that Litteral suddenly sexually assaulted the victim in 1997 and 1998, after having lived with her since 1990, would have seemed incredible without the testimony that the abuse began several years earlier, and continued until the victim moved out of the house in 1998. The evidence was relevant to the factual issues in this case.

Further, the evidence was not inadmissible simply because the nature of the evidence was prejudicial. Litteral has not demonstrated that he was unfairly prejudiced by the evidence.⁴³ While the acts described are serious and incriminating, such characteristics are inherent in the underlying crimes for which Litteral was charged. Moreover, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. The trial court instructed the jury as follows:

You have heard evidence that was introduced to show that [Litteral] has engaged in improper sexual conduct with which [Litteral] is not on trial. If you believe this evidence, you must be careful to consider it for only one limited purpose, that is, to help you judge the believability of testimony regarding the acts for which [Litteral] is now on trial. You must not consider this evidence for any other purpose.

For example, you must not decide that it shows [Litteral] is a bad person or that [Litteral] is likely to commit crimes. You must not convict [Litteral] here because you think he is guilty of other bad conduct.

⁴⁰ *People v DerMartzex*, 390 Mich 410, 415; 213 NW2d 97 (1973)

⁴¹ *Id.* at 414-415. See also *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000) ("evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant [is] admissible for the purpose of corroborating the complainant's testimony.")

⁴² *DerMartzex*, *supra* at 415.

⁴³ See MRE 403.

We presume that the jury followed this instruction.⁴⁴

C. Domestic Abuse

Litteral argues that he is entitled to a new trial because of the admission of evidence that he physically abused the victim's mother. We review a trial court's decision whether to admit evidence for an abuse of discretion.⁴⁵

During direct examination, the victim testified that she did not reveal the assaults because Litteral had threatened that "if [she] ever told anybody he'd kill [her]" and "hurt [her] mom." The following exchange then occurred:

Q. Did you believe these threats?

A. I was scared because he was very violent with my mother.

Q. Okay. Did you ever view this?

A. He would just, he would beat my mom to where she couldn't go to work at times because her eyes would be so swollen because of black and blue bruises. He knocked out her front tooth before.

Defense counsel objected, citing MRE 404(b). In response, the prosecutor argued that the testimony was admissible to explain the victim's state of mind, and her failure to timely report the incidents. The trial court ruled:

I think it is sufficient that she's testified that she was afraid to tell anybody and just leave it at that. Move on to another question.

We conclude that the trial court did not abuse its discretion. A defendant's prior bad acts are relevant to explain a victim's delay in reporting alleged abuse.⁴⁶ Here, the victim explained that she did not report the sexual abuse earlier because Litteral threatened to hurt both her and her mother and, considering Litteral's actions toward her mother, she believed the threat was credible. Thus, the evidence was relevant to an issue other than character or propensity, and its admission did not violate MRE 404(b).⁴⁷ Also, when we consider that the trial court limited the questioning to its proper purpose and foreclosed further questioning, we conclude that Litteral has not demonstrated that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.⁴⁸

⁴⁴ See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

⁴⁵ *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

⁴⁶ *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996).

⁴⁷ *VanderVliet*, *supra* at 85.

⁴⁸ See MRE 403.

VII. Sentence

A. Standard Of Review

Litteral argues that he is entitled to resentencing because the trial court failed to consider all relevant sentencing factors, relied on findings not determined by a jury, and failed to articulate reasons for the sentence imposed, which defendant maintains is disproportionate. Because the offenses for which the jury convicted Litteral occurred before January 1, 1999, the former judicial sentencing guidelines apply to this case.⁴⁹ This Court reviews sentencing decisions for an abuse of discretion. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender.⁵⁰

B. Proportionality

Because Litteral's 40-year minimum sentences are within the judicial sentencing guidelines recommended ranges of 240 to 480 months, they are presumptively proportionate.⁵¹ Although a sentence within the guidelines range could be disproportionate,⁵² here Litteral has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality.

Further, although a sentencing court must articulate on the record the criteria considered and the reasons supporting its sentencing decision, it need not expressly mention each goal of sentencing when imposing sentence.⁵³ "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines."⁵⁴ In imposing sentence, the trial court stated:

The policy of the State of Michigan factors individualized sentencing for every convicted defendant. The sentence must be tailored to the circumstances of the case and the defendant. In tailoring the sentence to the offense of [Litteral], the Court has gathered complete and detailed information about [Litteral]. The Court is satisfied with the reliability of the information received, and is satisfied that it [is] reasonably up to date and has determined it is competent as a sentencing consideration.

When we sit up here in judgment of people in passing out sentences, it is rather different when you are going to impose a sentence on an individual where

⁴⁹ MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

⁵⁰ *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

⁵¹ *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994).

⁵² *Milbourn*, *supra* at 661.

⁵³ *People v Rice (On Remand)*, 235 Mich App 429, 445-446; 597 NW2d 843 (1999).

⁵⁴ *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

you presided over the trial because many more things come out in the trial than their Court can comprehend and perceive in a Pre-Sentence Report where individuals plead guilty. Having sat in the positing for the past 14 years, the Court cannot recall a more devastating trial than the facts that were elicited in this case. Even to the extent when witnesses testified that they observed what you were going [sic], yet they didn't come forward. And many times this Court, as my colleagues also do, receive letters at time of sentencing from family members of the family telling us what good people they are, and it was [sic] mistake, and he or she has learned his lesson, but [Litteral], this is the very first time I get a letter from a mother who tells me to put you away forever. That says a lot.

In view of the recent U.S. Supreme Court cases regarding guideline ranges, the Court wants to state that the sentence I'm going to impose is strictly based on the facts and evidence introduced during the trial and the jury's return of guilty on all counts. I'm not taking into account some of the other items that the jury did not know about including the prior incarceration, including the prior charges, and the plea to the lesser offense, but based upon what this Court knows and what this Court heard.

The trial court addressed the offender, and the sentence imposed was consistent with the applicable guidelines range, which demonstrates that the sentence was individualized. The articulation was adequate to justify the sentences.

C. *Blakely*

We find no merit to Litteral's claim that he must be resentenced because the trial court's factual findings supporting his sentence were not determined by a jury, contrary to *Blakely v Washington*.⁵⁵ In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. The Michigan Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme.⁵⁶

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kathleen Jansen

⁵⁵ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁵⁶ *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).